Supreme Court, U.S.
FILED

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No.

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1994

JOHN R. IVIMEY, SR.,

Petitioner,

v.

THE VARIABLE ANNUITY
LIFE INSURANCE COMPANY.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether the Court of Appeals erred, and deprived plaintiff of due process of law, by affirming a district court's dismissal of this case for want of jurisdictional amount, in view of its ruling that the parties' contract could be terminated, that it was terminated, or that plaintiff's Unfair Trade Practices claim was barred by the statute of limitations, where no such affirmative defenses were pled, nor ruling thereon complained of by any party on appeal or cross-appeal?

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STATEMENT OF JURISDICTION

The judgment in the Court of Appeals sought to be reviewed was entered on April 15, 1994.

The statutory provision conferring jurisdiction on this Court to review the judgment below by writ of certiorari is 28 U.S.C. 1254(1).

The statutory provision conferring jurisdiction on the district court is 28 U.S.C. 1332(a)(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

28 U.S.C. 1332(a)(1):

> The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $50,000, exclusive of interest and costs, and is between --
> (1) Citizens of different States.

Connecticut General Statutes Sec. 52-595:

> Fraudulent Concealment of Cause of Action. If any person, liable to an action by another, fraudulently conceals from

> him the existence of the cause of such action, such cause of action shall be deemed to accrue against such person so liable therefor at the time when the person entitled to sue thereon first discovers its existence.

Applicable portion of the 5th Amendment to the Constitution of the United States:

> No person shall...be deprived of life, liberty, or property, without due process of law;...

Applicable portion of Fed. R. Civ. P. 8(c):

> Affirmative Defenses. In pleading to a preceding pleading, a party shall set forth affirmatively...statute of limitations...and any other matter constituting an avoidance or affirmative defense.

Applicable portion of Fed. R. Civ. P. 12(b):

> How Presented(Defenses). Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third party claim, shall be asserted in the responsive pleading thereto if one is required.

Federal Rule of Evidence 901(1):

> The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

STATEMENT OF THE CASE

The pleadings in this case claim expectancy damages as a consequence of defendant's breach of an implied promise to make certain arrangements which would enable plaintiff to perform under the parties' contract. The result of said breach was that plaintiff was deprived of substantial income, earned each year, which was payable to him by defendant in small increments each year over many years. Evidence was introduced to the jury showing such increments would be payable for likely twenty years or more, on average, with the result that plaintiff, an individual contractor, would accrue annual earnings of between $50,000-$100,000 (Tr. June 9, 1993, pp. 32-102). However, the court dismissed the case for want of jurisdictional amount, implying that, since

the contract provided it could be termina-on thirty days notice, plaintiff's damages were limited to those incurred through the termination period. That ruling, at trial, contained no finding that a termination, in fact, occurred (Tr. June 10, 1993, pp. 48-49).

On a motion to reconsider, the court quoted a provision in the contract, ¶11(b), which states:

> "This contract may also be terminated by either party for any reason by giving the other party at least 30 days advance written or by mutual consent of both parties at any time. Upon any termination of this contract VALIC shall not be entitled to any further Compensation under this contract."

The court then again implies that the existence of such provision limits plaintiff's recovery to "expectation damages" for the period prior to receipt of termination notice, plus 30 days (D. 94, pp.4,5).

Said ruling also states (D. 94, p.6):

> The plaintiff, however, was not officially terminated until March of 1985.

No court below refers to any source for such assertion that any termination took place, that any "advance written notice" thereof was given by either party to the other, nor that there was any "mutual consent" of the parties thereto, as required by the aforesaid provision, ¶11(b). In fact, there is no record of any evidence to support any such assertion.

Nevertheless, the Court of Appeals affirmed all the foregoing rulings, citing a case and authority out of context, which pertain to action brought for unlawful terminations, not, as herein, for damages consequent to defendant's breaches, where no termination is alleged or shown. (see ruling, pp. 2-3, where the assertions of

the trial court are repeated without reference to the record expressly). Moreover, both courts below misstate the the testimony of plaintiff as to the amount of his earnings during the first few years of the contract by implying that he anticipated earnings of only $5,000 to $6,000 during those years. In fact, plaintiff expressly clarified in his testimony that such might be the portion of his earnings payable to him during those years, supra p. , (Tr. June 9, 1993, pp.101-102, Tr. June 10, 1993, p.29), but that the income actually earned during those years would not be all payable to him for many years. Also, defendant never pleaded any termination as an affirmative defense or otherwise.

It should also be noted that plaintiff also pleaded breach of covenants of good faith and fair dealing.

Also appealed was a ruling of the district court that plaintiff's separate claim, pursuant to the Connecticut Unfair Practices Act (CUTPA), is barred on the asserted ground that plaintiff is an "employee" of defendant. The Court of Appeals did not rule on that issue, but instead ruled that the CUTPA claim is barred by the statute of limitations.

In fact, no such statute of limitations issue was ruled on in the trial court, other than its ruling plaintiff's motion to amend the complaint to plead CUTPA was granted, notwithstanding defendant's objection thereto on statute of limitation grounds.

Of the greatest importance, however, is that no statute of limitations issue is part of the trial court decision complained of on appeal to the Court of Appeals, and

no cross-appeal was filed by defendant as to any statute of limitations issue.

The damages allowable under CUTPA would greatly enhance those additionally available to plaintiff in this case.

The appealed judgment is also tangential for other reasons. It rules any tort claims are barred, p.2, but plaintiff had always argued, and the district court had ruled, that none of plaintiff's claims sounded in tort; it was defendant who strove to devine torts issues out of plaintiff's plainly contract issues, so that it could raise statute of limitations issues, but no such matters were raised at trial or on appeal, having all been previously resolved.

The foregoing is illustrative of several irrelevant and prejudicial distortions arrayed against plaintiff and the truth.

REASONS FOR GRANTING WRIT

In view of the foregoing facts it is transparent that the courts below mischaracterized the matters at issue in this case. Plaintiff's expectancy damages claim is entirely unrelated to any unlawful termination claim to which the courts' rulings are tailored.

Moreover, before said courts could have any jurisdiction over any termination issue it is essential that such have been pleaded by defendant as an affirmative defense as constituting an avoidance, Rule 8(c) of the Federal Rules of Civil Procedure, Wright & Miller, Federal Practice and Procedure, Civil 2d., Vol 5, Sec. 1271, p. 446, Fed. R. Civil P. 12(b), C.J.S., Vol. 35A, Federal Civil Procedure, Sec. 301, pp, 438-440, Sec. 306, p.449 (citing numerous federal cases). To allow or consider such

unpled matter deprives plaintiff of his due process rights whereby he must be allowed sufficient time and opportunity to prepare. Costello v. Costello, 186 Conn. 773, 776 (1982), Kron v. Thelen, 178 Conn. 189, 193, 423 A.2d 857, 859, Kukanskis v. Griffith, 180 Conn. 501, 509-510, 430 A.2d 21, 25 (1980), all citing several United States Supreme Court decisions and United States Constitutional Amendment 5th.

As well, even if jurisdictional and constitutional mandates did not preclude the courts' consideration of any termination issue, the amount of plaintiff's claim may not be compromised on the basis of a contractual right to terminate which was not exercised.

Possibly the rulings below refer to a certain internal document of defendant (plaintiff's Exhibit 29) which, for its own

purposes, defendant may have distributed among its various departments and personnel. This document was first produced for plaintiff by defendant during discovery after this case was under way, but it was never represented by anyone to constitute compliance with the aforesaid contract termination provision, ¶11(b). Indeed, the document is not even addressed to plaintiff nor conforms in any way with the requirements of ¶11(b), and it is dated many months after the breaches alleged in the complaint occurred.

In fact, this document was tentatively offered in evidence by plaintiff at the end of trial when the court requested that all such exhibits be offered, because it confirms that plaintiff satisfactorily performed under the contract and was not charged with any misconduct. Moreover, the

contents of said document were not yet officially an exhibit, for no foundation had as yet been laid therefor as required by F.R.E. 901. As well, as ruled in Jefferson Savings & Loan Association v. Lifetime Savings & Loan Association, 396 F.2d 21, 23 (CA9 Cal. 1968), cited in the Apr. 1994 Supplement to Am. Jur. 2d, Vol. 29, Evidence, Sec. 840, p.418:

> A party may introduce documentary evidence prepared by his adversary without being bound by it.

Jefferson cites as authority Jerrold Electronics Corporation v. Wescoast Broadcasting Company, 341 F.2d 653, cert. den. 382 U.S. 817, 86 S. Ct. 42, 15 L. Ed.2d 64 (1965), and Footnote 4, p.23, citing the 2nd Circuit in United States v. Freeman, 302 F.2d 347 (2 Cir., 1962), cert. den. 375 U.S. 958, 84 S. Ct. 448, 11 L.Ed.2d 316 (1963) as follows:

> The movement has been away from the practice of giving artificial values or protection to evidence by preventing the party introducing it from showing that it is false in whole or in part.

It should also be noted that if the jury found defendant breached the contract as alleged in the complaint plaintiff was discharged from any duty to perform under the contract, and the contract survives for the purpose of a lawsuit measuring plaintiff's claims arising out of such breach(s), Bernstein v. Nemeyer, 213 Conn. 665, 672-673, 570 A.2d 154, 168 (1990), Rokalor, Inc. v. Connecticut Eating Enterprises, Inc., 18 Conn. App. 384, 391-392, 558 A.2d 265, 269-270 (1989), citing Vescue v. Lee, 185 Conn. 328, 334, 441 A.2d 556 (1981), Better Building Materials Co. v. Kirschner, 142 Conn. 1, 10, 110 A.2d 464 (1954), 4A Corbin, Contracts, Sec.

946, 17 Am. Jur. 2d, Contracts, Sec. 428, J. Calamare & J. Perillo, Contracts, 3d Ed., 2 Restatement(Second), Contracts, Secs. 237 & 238. See also Barnett v, Barnett, 26 Conn. App. 355, 358, 600 A.2d 1055, 1057 (1992), ruling:

> "Performance of contract is excused when the thing to be done becomes impossible."

Also, where a defendant, as herein, repudiates or nullifies procedures established by a contract, the injured party is excused from performance, Fortune v. National Cash Register Co., 364 N.E.2d 1251, 1259, citing Restatement(Contracts), Sec. 302 (1932 and 3A Corbin, Contracts, sec. 759 (1960), as cited in Frederick v. Conagra, Inc., 713 F. Supp. 41 (1989). Such a breaching defendant may not continue to reap a contract's benefits, Hal Roach Studio v. Film-Classics, 156 F.2d 596, 599.

At minimum plaintiff has a right to a jury determination as to whether defendant committed the breaches alleged, before a court below may rule on any properly alleged affirmative defense alleging termination. If such breach occurred, defendant has plainly forfeited any right it may formerly have had to terminate the contract.

Plainly there is no evidence whatever on the record that any termination ever occurred, other than a general atrophy of the contract due to defendant's failure to perform, and the contract may be deemed to still exist pending such performance. In fact, due to defendant's breach(es), plaintiff may construe the contract to currently be in abeyance, until defendant performs in a manner enabling plaintiff to resume his performance; meanwhile sums accruing thereunder for plaintiff's bene-

fit are unlawfully being withheld from the plaintiff by defendant, unless it be construed that said atrophic state renders the contract terminated, a condition which defendant neither alleges nor apparently can prove. Plaintiff is not required to suffer any losses due to defendant's breaches, and he has pled such breaches and is entitled to a jury verdict as to their existence before any contract termination can be presumed to have taken place by way of mere atrophy caused by defendant's neglect of its duties.

Also, plaintiff is independently entitled to a jury verdict on his pleaded breach of covenant of good faith and fair dealing, even if it could be shown that a termination had occurred. The issue is still open as to whether any such termination was obtained in good faith and

fairness in view of the allegations in the complaint. The courts below have not addressed this properly pled issue, which is another deprivation of plaintiff's due process rights under the 5th Amendment and the procedures of the courts.

As well, in that the Court of Appeals has not ruled upon the issue before it concerning plaintiff's CUTPA claim, an additional deprivation of due process exists. Instead, that court has ruled on a matter pertaining to CUTPA which was not before the court, supra, p.7.

A party not appealing is not entitled to assert any error, in this case pertaining to any statute of limitations matter. The scope of appellate review is limited to the part(s) of the decision below complained of only by the appealing party. Courts of Appeal have jurisdiction only

over appeals from orders and judgments of courts below, EEOC v. Pennsylvania, 768 F.2d 514, 516 (CA3 Pa 1985), citing 28 USCA Sec. 1291.

Moreover, even had a statute of limitations issue been before the Court of Appeals, that court could not properly rule that such statute barred the CUTPA claim, for, in his reply brief, pp.13, 21, plaintiff clarified that the CUTPA claim related to matter recently revealed on discovery in this case, which occasioned plaintiff's amendments and supplements to the complaint, and, because such matter was fraudulently concealed from the plaintiff, the statute of limitations as to such matter was tolled, as provided in Connecticut General Statutes, Sec. 52-595.

Under Connecticut law, a CUTPA plaintiff may recover punitive damages in addit-

ion to attorney fees, S&S Tobacco & Candy Company v. Stop & Shop Companies, Inc. 815 F. Supp. 65, 66 (D. Conn. 1992), citing several 2nd Circuit and Connecticut Supreme Court cases. See also Catucci v. Ouellette, 592 A.2d 962, 964, 25 Conn. App. 56, 61, ruling that CUTPA provides for actual and punitive damages and equitable relief, as well as "any ascertainable loss." Indeed, in Bailey Employment Systems, Inc., v. Hahn, 545 F. Supp. 62, 73, affirmed 723 F.2d 895, it was ruled that double the actual damages as punitive damages would also be awarded.

Consequently it is clear that the courts below improperly deprived plaintiff of the opportunity to obtain a jury verdict which would greatly enhance the total monetary award he could reasonably expect.

Thus no want of jurisdictional amount

can be found in this case, predicated on unpled defenses which were thus waived and may not be considered by the courts below, supra pp.9-10.

Moreover, raising such matters at trial and in rulings by surprise, and without stating any facts or particulars upon which such rulings are based, whereby plaintiff had no reasonable opportunity to prepare adequate responses, is not only improper and prejudicial to plaintiff, but such also deprives him of due process, A party must be given an ample opportunity to secure and present evidence relevant to the existence of jurisdiction. See Colonial Pipeline Company v. Collins, 921 F.2d 1237, 1243 (1991), citing Gould, 853 F.2d at 451, etc., Wright &. Miller, Federal Practice and Procedure, Vol. 5A. Sec. 1271, p.446 and Sec. 1373, pp. 552-554, 555-556. The

courts' lack of specificity in its rulings also prevented plaintiff from framing arguments in opposition thereto. The courts should state the subordinate facts from which conclusions are reached, Faille v. Hollett, 150 Conn. 397, 399, and , as stated in Shaffer v. Coty, 183 F. Supp. 662, 665(S.D. Cal 1960), citing Wetmore v. Rymer, 169 U.S. 115, 121, 18 S. Ct. 295:

"Of course the District Court's 'mode of determination' of jurisdictional issues must always be such as to permit a reviewing Court to ascertain whether the evidence supports the trial court's finding."

Indeed, the foregoing places the courts below in positions where they not only deprived plaintiff of fundamental due process, but as well acted as advo-

cates for defendant, belatedly "pleading" defendant's defenses. Such was done notwithstanding the fact that the district court had issued a Trial Preparation Order (D. 55), which required defendant to reveal all its defenses prior to trial, and none of the foregoing matters was raised in defendant's responses to that order.

Moreover, the jurisdictional amount issue had already been raised and ruled upon in plaintiff's favor, by Judge Dorsey, (CofA App. p.41) in 1990, at a time when all essential facts to conclude such issue were before the court. The issue was thus res judicata on this threshhold question of law. 32 Am. Jur. 2d, Federal Practice, p.760, Wright & Miller, 13A Federal Practice and Procedure, Sec. 2536, p. 537, Stoll v. Gottlieb, 305 U.S. 165,

172, 83 L. Ed. 104, 109.

In the rulings below the courts, as well, disregarded the gravamen of plaintiff's pleadings and testimony, the central substance of which pertained to expectancy damages caused by the deprivation of opportunity to perform the contract, because of defendant's breaches. Instead the courts focus rulings on the amount of pled and unpled minor technical damages, the amount of which is incidental to the entire focus of said pleadings and testimony.

The jury verdict on the expectancy damages on which plaintiff introduced abundant evidence was potentially very high, particularly in view of the evidence of bad faith and unfair dealing of defendant produced, but the courts frustrated such with their own "pleadings." See

Frederick V. Conagra, Inc., 713 F. Supp. 41, 48 (1989), Thompson v. Thompson. 226 U.S. 551, 560, 33 S.Ct. 129, 130, 57 L. Ed. 347, Brotherhood of Locomotive F.E. v. Pinkston, 293 U.S. 79, 55 S.Ct. 1, 79 L. Ed. 219. As ruled in Harger v. Burger King, 729 F. Supp. 1579 (1980):

> The amount in controversy must be determined by the value to be protected. The plaintiffs are suing Burger King in this case to protect their alleged right to continue receiving monthly payments pursuant to a brokerage agreement until February 1994. Therefore the value of the right is the aggregate amount that the plaintiffs are allegedly owed.

Such is, in fact, the type of damages principally sued for by the plaintiff in this case, which should control.

As a result of the foregoing, plaintiff was also deprived of the right to a verdict on additional damages on claims in other paragraphs of the complaint, all

of which were unaddressed, in substance, because the dismissal renders such moot.

All of the foregoing, supported by additional authority, was contained in plaintiffs briefs before the Court of Appeals. Such matters go to the integrity of the federal judiciary and its conformance to the letter and spirit of the Constitution of the United States, federal practice and procedural rules, and the many rulings of the United States Supreme Court, supporting that Constitution and those rules, crucial principles which ought not be allowed to seep away to favor parochial interests.

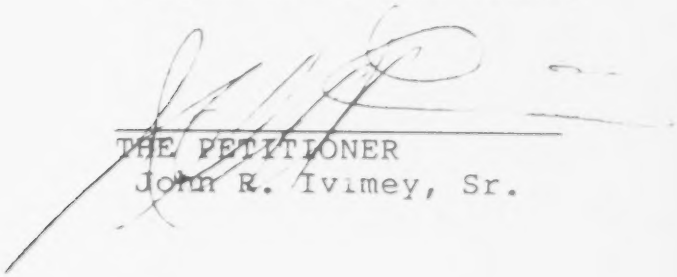
Litigants have a fundamental right to a fair trial pursuant to all the rules of practice and procedure, and their due process rights as guaranteed by the Constition of the United States. Where a

litigant has been deprived of those rights a judgment doing so is reversible and should be reversed.

CONCLUSION

For the foregoing reasons plaintiff respectfully requests this Court to grant the within Petition for Writ of Certiorari.

Respectfully submitted,



THE PETITIONER
John R. Ivimey, Sr.

APPENDIX

(Ruling on Appeal)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PRESENT:

HON. ROGER J. MINOR,
HON DENNIS G. JACOBS,
Circuit Judges
HON. JACOB MISHLER,
District Judge

JOHN R. IVIMEY,
Plaintiff-Appellant,

v. ORDER 93-7852

VARIABLE ANNUITY LIFE INSURANCE CO. &
WILLIAM F. SCOTT,
Defendants-Appellees.

UPON CONSIDERATION of this appeal from a judgment of the United States District Court for the District of Connecticut, it is hereby

ORDERED, ADJUDGED, AND DECREED that the judgment of said District Court be and it hereby is AFFIRMED.

Plaintiff-appellant John Ivimey

appeals from a judgment entered on June 14, 1993 in the United States District Court for the District of Connecticut (Covello, J.) dismissing his action for lack of subject matter jurisdiction, the district court having found that Ivimey had failed to satisfy the $50,000 amount required for diversity jurisdiction pursuant to 28 U.S. C. Sec. 1332(a)(1) (1988).

Ivimey filed a complaint in this action in July of 1989 against defendant-appellees Variable Annuity Life Insurance Company ("Variable") and its Northeast regional manager, defendant-appellee William Scott. The action arises out of Ivimey's employment with Variable between July of 1983 and March of 1985 as an agent to market tax-exempt annuity contracts to Connecticut public school employees. Sales of the annuities required the approval of the school districts, since the annuities were to be funded by payroll deductions. Moreover, a number of school districts had entered into exclusive contracts with companies other that Variable, which precluded the sale of Variable annuities in

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*Hon. Jacob Mishler of the United States District Court for the Eastern District of New York, siting by designation,

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those districts. In his complaint, Ivimey alleged that Variable had represented that it would be responsible for obtaining school district approval, a pledge that Variable allegedly disavowed only after

Ivimey began working for the company. Ivimey also charged that Variable failed to inform him of the exclusive contracts that restrained him from selling in certain districts.

In Count I of his original complaint, Ivimey alleged that Variable had breach a constructive condition and an implied promise embodied in the agency contract between the parties, as well as an implied covenant of good faith and fair dealing with regard to that contract. Ivimey alleged that this breach by Variable deprived him of income he would have been entitled to before, during and after the term of the contract. In Count II, Ivimey alleged a claim for fraudulent misrepresentation on the part of Variable. In the ad damnum clause, Ivimey requested $850,000 in compensatory damages plus punitive damages. In July of 1991, after discovery, the district court granted Ivimey's motion to amend the complaint to add to Count I a claim for the recovery of unpaid commissions and to add a new Count III in which Ivimey alleged violations of the Connecticut Unfair Trade Practices Act, Conn. Gen. Stat. Sec. 42-110a, et seq.

After a series of summary judgment motions, the case proceed to trial in June of 1993. At the close of Ivimey's case, the court sua sponte questioned whether the $500,000 jurisdictional amount had been satisfied. After affording Ivimey an opportunity to explain how his damages exceeded $50,000, the court dismissed the action for lack of subject matter jurisdiction. On

Ivimey's motion for reconsideration, the district court issued an order on July 21, 1993 confirming its dismissal. This appeal followed.

Subject matter jurisdiction in diversity cases is conferred upon the district courts where "the matter in controversy exceeds the sum or value of $50,000." 28 U.S.C. Sec. 1332(a)(1). In determining the jurisdictional amount, the sum claimed by the plaintiff usually controls. St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 288-89 (1938). However, "if, from the face of the pleadings, it is apparent to a legal certainty, that the plaintiff cannot recover the amount claimed, or if, from the proofs, the court is satisfied to a like certainty that the plaintiff never was entitled to recover that amount, . . . the suit will be dismissed." Id. at 289.

In this case, only Ivimey's claims on the contract are viable. Any tort claims are barred by Connecticut's three-year statute of limitations for tort actions. See Conn. Gen. Stat. Sec. 52-577. The claim for unpaid commissions is subsumed within the breach of contract claim. Finally, Ivimey's CUTPA claim is barred by the three-year statute of limitations specified in that act. See Conn. Gen. Stat. Sec. 42-110g(f).

We agree with the district court that under no view of the facts presented at trial could Ivimey have proven contract damages in excess of $50,000. The contract between Ivimey and Variable specified that the contract could be terminated by either arty on thirty days' notice. Accordingly,

Ivimey's damages were limited to those incurred prior to and during the termination period. See 22 Am. Jur. 2d, Damages Sec. 112; King v. Exxon Co., 618 F.2d 1111, 1118 (5th Cir. 1980). In addition, viewing the facts in his favor, Ivimey could have recovered ncidental damages incurred during the same period. However, Ivimey has not shown the type of malicious, bad faith breach of contract which would justify an award of punitive damages. See, e.g., L.F. Pace & Sons, Inc., v. Travelers Indemnity Co., 514 A.2d 766, 775-76 (Conn. App. 1986).

At trial, Ivimey claimed that he anticipated $5000 to $6000 in commissions for the first few years of employment and had incurred a maximum of $11,500 ($37.50 per day times 300 days) in travel expenses during his employment with Variable. Since the employment contract in this case was terminated in March of 1985 after less than two years, Ivimey's total contract damages could not exceed $50,000. From the evidence adduced at trial, this is apparent to a legal certainty.

We have considered all of Ivimey's arguments raised on his appeal and conclude that they are without merit.

HON. ROGER J. MINOR
HON. DENNIS G. JACOBS
HON. JACOB MISHLER

N.B. THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND SHOULD NOT BE CITED OR OTHERWISE RELIED UPON IN UNRELATED CASES BEFORE THIS OR ANY OTHER COURT.

Supreme Court, U.S.
FILED
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No. 94-113

In The

Supreme Court of the United States

October Term, 1994

JOHN R. IVIMEY, SR.,

Petitioner,

VS.

THE VARIABLE ANNUITY LIFE INSURANCE COMPANY and F. WILLIAM SCOTT,

Respondents.

On Petition For Writ of Certiorari
To the United States Court Of Appeals
For The Second Circuit

BRIEF OF THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

Whether the court below is correct in affirming the district court's dismissal for lack of subject matter jurisdiction over petitioner's claim for breach of employment contract on the ground that, as a matter of law, the petitioner's claim did not satisfy the $50,000 amount required for diversity jurisdiction pursuant to 28 U.S.C. §1332(a)(1); and whether the court below is correct in affirming the district court's grant of summary judgment for respondents on petitioner's claim under the Connecticut Unfair Trade Practices Act, Conn. Gen. Stat. §42-110a, et seq., on the ground that it is barred by the statute of limitations.

DISCLOSURE OF CORPORATE PARENT

American General Corporation is the parent corporation of respondent, Variable Annuity Life Insurance Company.

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No. 94-113

In The

Supreme Court of the United States

October Term, 1994

JOHN R. IVIMEY, SR.,

Petitioner,

VS.

THE VARIABLE ANNUITY LIFE INSURANCE COMPANY and F. WILLIAM SCOTT,

Respondents.

On Petition For Writ of Certiorari
To the United States Court Of Appeals
For The Second Circuit

BRIEF OF THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court below is unreported, and is reproduced in Petitioner's Appendix at A-1 to A-5.

JURISDICTION

The judgment of the court of appeals was issued as mandate on May 6, 1994. The petition for writ of certiorari was filed on July 14, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATEMENT

This case arises out of the employment relationship between the petitioner and the respondent, The Variable Annuity Life Insurance Company (Variable). The petitioner was hired by Variable in July, 1983 as a sales agent to market tax exempt annuity contracts to Connecticut public school employees. The parties' employment agreement was reduced to a written contract, executed by the plaintiff on July 1, 1983 (the Contract).

The Contract was terminable by either party upon the giving of thirty (30) days notice.

Sales of the tax-exempt annuities were restricted in certain Connecticut school districts to annuity contracts issued by annuity companies approved by the school district. Therefore, in order for the petitioner to sell annuity contracts within any such school district, Variable had to be an approved company.

Shortly after the plaintiff's employment with Variable, a dispute arose between the petitioner and the respondent, F. William Scott, Variable's northeast regional sales manager (hereafter Scott), as to whose responsibility it was to obtain approval for Variable to sell within a given school district. The petitioner maintained that it was

Variable's responsibility to do so. Variable maintained that this in fact was one of the petitioner's job duties as a Variable sales agent. The petitioner fared poorly as a Variable sales agent, and was ultimately terminated effective March 1985.

In July 1989, the petitioner commenced the instant action against Variable and Scott, claiming breaches of constructive and implied conditions of the Contract, and seeking damages by way of lost earnings. Jurisdiction was alleged to be based on diversity of the parties under 28 U.S.C. §1332(a). The defendants filed an answer denying subject matter jurisdiction and asserting affirmative defenses of failure to state a claim upon which relief may be granted and statute of limitations.

After discovery, the petitioner amended his complaint to add, inter alia, a claim for breach of the Connecticut Unfair Trade Practices Act, Conn. Gen. Stat. §42-110a, et seq. (CUTPA). The respondents thereafter moved for summary judgment. The district court granted summary judgment in favor of respondent Scott as to all claims, and granted summary judgment in favor of Variable on the petitioner's CUTPA claim.

The case then proceeded to trial on June 9 and 10, 1993 on petitioner's claims for breach of constructive condition of the contract and the implied covenant of good faith and fair dealing. At the close of the petitioner's case, the district court, sua sponte, raised the issue of the court's subject matter jurisdiction over the petitioner's claim, as it was

apparent, to a legal certainty, that petitioner had failed to produce evidence to allow the jury to find damages in excess of $50,000. After allowing the petitioner an opportunity to identify any evidence which would substantiate a claim of damages within the jurisdictional amount, the court dismissed the case. The petitioner thereafter filed a motion for reconsideration. In ruling on the petitioner's motion the district court confirmed dismissal of the case for lack of subject matter jurisdiction.

The petitioner thereafter appealed the decision of the district court to the Second Circuit court of appeals, taking issue with the district court's: dismissal for lack of subject matter jurisdiction; limitation of the petitioner's claims to breach of constructive condition of the

contract and implied covenant of good faith and fair dealing; granting of summary judgment in favor of the respondents on his claim under CUTPA; and reliance upon interrogatory responses in considering the motions for summary judgment. The court below affirmed the district court's rulings, holding that, to a legal certainty, the petitioner had failed to introduce evidence to support a claim for damages with the jurisdictional amount, (Pet. App. A-4), and that petitioner's claims under CUTPA were barred by the applicable statute of limitations. (Pet. App. A-5). All other issues were deemed to be without merit. Id.

Petitioner now seeks this Court to grant a writ of certiorari, claiming that both the district court and the circuit

court misconstrued his evidence. He now claims, for the first time, that his employment with Variable was never terminated, and that he should therefore be entitled to continued commissions under the Contract, damages which would satisfy the jurisdictional requirements. Petitioner's second issue raised in his petition is that his CUTPA claim should not be barred by the statute of limitations because: the respondents did not raise the statute of limitations as a special defense; and that his cause of action was fraudulently concealed by the respondents until it arose in discovery.

REASONS FOR DENYING THE WRIT

I. Petitioner Presents no Issues in Conflict Among the Circuit Courts, nor any Special or Important Issues

1. The petitioner fails to present any issues involving conflict within the circuit courts, nor does he offer any special or important reasons for granting a writ of certiorari. This Court simply should not waste any more of its valuable time in considering this petition.

A review on writ of certiorari is not a matter of right, but of judicial discretion, which will be granted only when there are special and important reasons therefore. S. Ct. R. 10.1. "'Special and important reasons' imply a reach to a problem beyond the academic or the episodic." Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70, 74,

(1955). No such issues are presented in this case.

The jurisdiction of this Court by way of certiorari is not conferred merely to give the defeated party another hearing. Magnum Import Co. v. Coty, 262 U.S. 159, 163 (1923). "[A] court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional show of error." Graver Tank & Mfg. Co. v. Linde Co., 336 U.S. 271, 275 (1949). Certiorari is not granted "to review evidence and discuss specific facts." United States v. Johnston, 268 U.S. 220, 227 (1925). The issues presented here are factually intensive, and are governed by long established legal

principles which do not raise any unique or important issues requiring this Court's determination. As this petitioner merely seeks to have this Court re-evaluate the evidence and issues already duly considered and disposed of by the district and circuit courts, his petition must be denied.

II. Petitioner may not Raise New Issues for the First Time on Petition for Writ of Certiorari

1. The Petitioner raises for the first time in his petition to this Court the issue as to whether or not his employment with Variable, and thus the Contract, was ever terminated. (Pet. p. 9). Petitioner is apparently trying to claim that because the Contract with Variable was never terminated, he is entitled to continue to reap the benefits therefrom. (Pet. pp. 15-16).

Petitioner failed to raise this isuue as error before the circuit court. That the Supreme Court will not discuss a petitioner's contentions which he failed to assign as error below is established, black letter law. Sonzinsky v. United States, 300 U.S. 506, 514 (1937). "'Ordinarily, [the Supreme Court] does not decide questions not raised or resolved in the lower court[s].' Youakim v. Miller, 425 U.S. 231, 234 (1976) (per curiam). These principles help to maintain the integrity of the process of certiorari. Cf. Oklahoma City v. Tuttle, 471 U.S. 808, 816 (1985)." Taylor v. Freeland & Kronz, 503 U.S. _____, 112 S. Ct. 1644, 1649 (1992).

Because the petitioner has raised the issue of the termination of the Contract for the first time in his

petition, it should not now be considered by this Court as a reason to grant certiorari.

III. The Decision of the Court Below was Correct

1. The decision of the circuit court in affirming the district court's dismissal of the case for lack of subject matter jurisdiction was a correct one, based on established federal law.

It was the petitioner's burden to prove that the amount in controversy met the jurisdictional requirements. McNutt v. General Motors Acceptance Corp., 298 U.S. 178, 189 (1936). The petitioner was allowed every opportunity to establish that his damages were in excess of $50,000; see A.F.A. Tours Inc. v. Whitchurch, 937 F.2d 82, 88 (1991); but he was unable to do so. The district court

properly raised the issue of subject matter jurisdiction sua sponte. Fed. R. Civ. P. 12(h)(3). Having the advantage of receiving all of petitioner's evidence introduced at trial, the district court then determined that, to a legal certainty, the petitioner had failed to introduce sufficient evidence to allow a jury to find that his claim satisfied the jurisdictional requirements. St. Paul Mercury Indemnity Co. v. Red Cab Co., 303 U.S. 283, 288-89 (1938). There is no merit to petitioner's claim that such an issue of jurisdiction must be submitted to the jury. Wetmore v. Rymer, 169 U.S. 115, 121-22 (1898).

Given that the circuit court's decision is firmly grounded upon established legal principles, there is no reason for this Court to conduct yet

another review of the facts of this case, simply because petitioner is dissatisfied with the outcome.

2. The petitioner also claims that he should have been allowed to proceed on his CUTPA claim for two reasons: the defense of statute of limitations was not properly raised by the respondents; and, even if the statute of limitations was properly before the court, the respondents fraudulently concealed his cause of action under CUTPA, tolling the statute of limitations pursuant to Conn. Gen. Stat. §52-595. The petitioner is wrong on both counts.

First, the respondents did in fact plead the statute of limitations as a special defense in their answer to petitioner's amended complaint. (R. 46). When the district court granted summary

judgment in favor of respondents on the CUTPA claim, it held that CUTPA was inapplicable to claims arising out of the employment context, and did not address the statute of limitations issue. (Ruling on Motion for Summary Judgment, July 2, 1992, R. 50, p. 3). Respondents raised the statute of limitations again in their brief to the circuit court, however, as an alternative basis on which to uphold the district court's ruling. The circuit court relied upon this alternative basis, holding that the CUTPA claim was barred by the statute of limitations, Conn. Gen. Stat. §42-110g(f). (Pet. App. A-4).

Second, the petitioner failed to properly raise the claim of fraudulent concealment, and may not at this late date be allowed to rely upon it. Connecticut law provides that:

> If any person, liable to an action by another, fraudulently conceals from him the existence of the cause of such action, such cause of action shall be deemed to accrue against such person so liable therefor at the time when the person entitled to sue thereon first discovers its existence.

Conn. Gen Stat. §52-595. The claim of fraudulent concealment must be affirmatively plead by a plaintiff seeking to invoke it. Beckenstein v. Potter & Carrier, Inc., 191 Conn. 150, 163, 464 A.2d 18 (1983). The plaintiff must then prove that the defendant was aware of the facts necessary to establish the cause of action in question, and that he intentionally concealed the cause of action from the plaintiff for purposes of obtaining delay. Connell v. Colwell, 214 Conn. 242, 250, 571 A.2d 116 (1990).

In the instant case, petitioner neither plead fraudulent concealment, nor

did he attempt to introduce, at any time, evidence of respondents' knowledge of any CUTPA claim, or their attempts to conceal the existence of such a claim from petitioner for purposes of delay. Therefore, petitioner cannot now rely on a claim of fraudulent concealment to breath life into an expired CUTPA claim.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

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September 13, 1994

Supreme Court, U.S.
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(3)

No. 94-113

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1994

JOHN R. IVIMEY, SR.,

Petitioner,

v.

THE VARIABLE ANNUITY
LIFE INSURANCE COMPANY.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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BEST AVAILABLE COPY

QUESTIONS PRESENTED FOR REVIEW

Whether respondent's brief in opposition evades the issues raised on the petition herein by substantively not addressing such issues, raising irrelevant and distracting matter, misrepresenting the substance of the petition, basing procedural issues on state instead of federal rules and raising false premises as to the claims of the petitioner.

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Note: Refernce is also made to the Erie doctrine, p.15. and the Rice, Beckenstein and Graver Tank cases, pp. 8,9,15, cited by respondent.

STATEMENT

At the outset, it is manifest that respondent's brief in opposition does not squarely address the issues in the petition herein, nor rebut its cases and authorities. It would be redundant to repeat such herein, and thus petitioner leaves the same for this Court's own observation.

However, petitioner must reluctantly point out that respondent's brief is riddled with false premises, deceptions, quasi-truths and misstatements which are harmful to respondent, some so fundamental that it can be wondered whether its author was familiar with this case. The more flagrant of such prejudicial and biased assertions are as follows, a complete list being prohibitably long:

1. Respondent falsely asserts petitioner "fared poorly" and (the contract betwwen the parties) was

"terminated effective March 1985." In fact, no evidence was ever introduced at trial to support such assertion, nor that either party complied with the provision in the contract which states:

> "This contract may also be terminated by either party for any reason by giving the other party 30 days advance written notice or by mutual consent of both parties at any time."
>
> (Note: This provision was cited in the petition, p.4, wherein by typographical error the word "notice" was inadvertantly omitted.)

Moreover, respondent did not plead such matter as an affirmative defense, as required.

2. Respondent curiously asserts trial commenced on claims of breach of constructive condition. Instead it has always been universally agreed

that what was it issue is breach of an implied promise, the court having long before found a claim for constructive condition inapplicable.

3. Respondent asserts this case arises out of an "employment relationship" whereas the parties' contract, ¶3.3, expressly provides that petitioner is an "independent contractor," and there was never an issue raised as to that status in the court below.

4. Respondent falsely asserts that petitioner now claims the courts below "misconstrued his evidence." Rather, the gravamen of the petition is on the issue as to whether or not the dismissal below could possibly be upheld in view of the fact that no evidence was before the court showing termination ever occurred or that any such defense was pled, and

on the additional issue whether bar of petitioner's CUTPA claim can be upheld on statute of limitations grounds where the district court never ruled on such grounds, and such issue was not before the circuit court on any appeal or cross appeal.

5. Respondent falsely asserts petitioner "for the first time" now claims his contract was never terminated. Instead petitioner has continuously made that claim, and it is included in his circuit court brief, pp.8,10,14,21, insofar as it could be determined whether the district court's dismissal on unspecified grounds might have included a termination factor, and in his reply brief, pp.2,3,4,5,6,7,8,9,10, after res-

pondent, for the first time, referred to such matter in its brief. Respondent never having plead any such affirmative defense, petitioner had considered it waived.

6. Respondent falsely implies that petitioner claims the issue of jurisdiction "must be submitted to the jury." In fact, what petitioner contends is that the court's dismissal was based upon factual issues which required a jury verdict upon which the court's jurisdictional ruling was required to be predicated, and that a jury verdict on the issue of breach of covenant of good faith and fair dealing was appropriate even if it could have been shown the contract was terminated. The court completely ignored the latter claim and the issues it invoked.

7. Respondent deceptively implies, p.15, that petitioner claims the CUTPA claim should be allowed for the reason the affirmative defense of statute of limitations was not properly raised by respondent, asserting petitioner is "wrong" because such defense was pled. In fact, respondent cannot be unaware that the reason instead is that respondent failed to raise such matter on appeal, (Pet. pp.7,8). Respondent agrees that the court did not address the statute of limitations issue, p.16; it was thus respondent's duty to raise such matter on appeal if it chose to do so. Respondents admit they "raised" such in their "brief," in the circuit court, but such was not at issue in that court, not only

because such was not a matter on appeal to the circuit court, but also because there was no ruling below on said issue which could be the subject of review.

REASONS FOR GRANTING WRIT

I. The Issues Presented on this Petition are Legal Issues of Special Importance, and the Courts Below are In Conflict with the Estabiashed Law and Precedents on Such Issues

1. The issues presented on this petition are legal issues of special importance, and the courts below are in conflict with the established law and precedents on such issues, notwithstanding respondent's specious assertions otherwise. Respondent's failure to address or rebut the facts, cases and authorities set forth in the petition evinces their merit and importance and respondent's awareness therof. Moreover, the cases respondent cites are genrally of neu-

tral value , irrelevant, inappropriate or contrary to respondent's own arguments. Such includes the Rice case, which is far removed from anything pertaining the case herein. In that case a divided Supreme Court contends with a unique situation described by Justice Black, @ 349 U.S. 70, 80, 75 S. Ct. 614, 620, 99 L. Ed. 897, 905-905, as follows:

> The Court dismisses the case because the Iowa Legislature has provided that every person in Iowa except one who has already filed a suit can prosecute claims like this. Apparently this law leaves everyone in Iowa to vindicate this kind of right except the petitioner. This raises a new question of denial of equal protection of the laws equally as grave as those which prompted us to take this case originally.

Thus Rice involves a defense anchored to the validity of a statute as a bar to an action:

> ...where it appears on further deliberation, induced by new considerations, that the case was not appropriate for adjudication.

See @ 349 U.S. 70, 79, 75 S. Ct. 614, 619, 99 L. Ed. 897, 904.

Moreover, respondent's citation from Rice is mere dicta quoting a speech given in another context outside any judicial forum, and it is difficult to reconcile it with any express question of law or fact.

Respondent next implies that petitioner proposes that this Court review findings of fact, by citing the Graver Tank case out of context, p.10, although respondnet dilutes that false implication by then stating that the issues presented ..." are governed by long established legal principles...." In fact, it is not findings of fact that characterize the errors below, but failure to apply procedural rules in disregard of facts.

This petition concerns very real legal questions as to whether courts below may rule contrary to a party in reliance on

matter not pled by his adversary which there was a duty to plead, whether appeals courts may base rulings on matters not on appeal nor ruled upon by courts below and whether courts may rule for a party in the absence of evidence favoring that party. Such legal issues have little or nothing to do with findings of fact, are not "academic" nor "episodic," but rather are real legal issues arising out of overt deprivations of due process, all in conflict with established federal principles of law.

II. Petitioner has Not Raised Any New Issue for the First Time on this Petition for Writ of Certiorari

Petitioner has not raised any new issue for the first time on this Petition for Certiorari. Such assertion by respondent, p.11, is irresponsible, false and without any merit or foundation, supra pp.1-2,4-5. Perhaps the assertion stems from what appears to be lack of familiarity with this

case on the part of the author of respondent's brief, or respondent's paucity of any basis for opposition to the petition. Moreover, in its STATEMENT(of the case), pp.2-8, respondent does not even assert the parties' contract was ever terminated.

In fact, the termination issue was central to the entire argument in the circuit court, relating to the propriety of the district court's ruling on petitioner's motion to reconsider its order dismissing this case on jurisdictional grounds, where the district court, for the first time, asserted the parties' contract had been terminated. (Pet. pp.3-6, A5,A6)

The record clearly reflects the foregoing, showing the centrality of the termination issue, and there is no merit to any assertion to the contrary on the within Petition for Writ of Certiorari.

Respondent's citations are irrelenant.

Respondent, moreover, seeks to imply that this termination matter applies only to the sums of technical damages respondent owes petitioner. Instead, this matter is chiefly addressed herein, as it was in the courts below, to the question as to propriety of the dismissal on jurisdcitional grounds, based on a non-existent termination of the parties' contract.

III. Respondent Attempts to Deceive this Court as to the Propriety of the Circuit Court's Ruling that Petitioner's CUTPA Claim is Barred By the Statute of Limitations

Respondent attempts to deceive this Court as to the propriety of the Circuit Court's ruling that petitioner's CUTPA claim is barred by the statute of limitations. Respondent does so by falsely asserting that..."petitioner"...claims... "the defense of statute of limitations was not properly raised by respondents;..." and then stating..."the respondents did in

fact plead the statute of limitations as a special defense"..., p.15, supra pp.6-7.

This diversion begs the question, because petitioner's actual claim is that respondent did not raise on appeal, or cross appeal, any issue pertaining to the fact that the district court did not rule on respondent's motion seeking denial of the CUTPA claim on statute of limitations grounds. Hence no such matter was before the circuit court for review.

To compound the impropriety of both respondent and the circuit court, respondent admits such practice and the holding of the circuit court rely upon the same issue's introduction "in their brief" in the circuit court, as an "alternative" argument, p.16.

Such admitted error ought be of the greatest consternation to this Court. Not only was respondent's attempt to obtain an

original ruling in the circuit court a gross impropriety, but the circuit court's grant of such ruling is mind-numbing. See petition, pp.17-18, citing the limitations on the jurisdiction of Courts of Appeal, substantively admitted in respondent's brief, p.12.

In fact, the circuit court appears not to have addressed at all the CUTPA issue actually on appeal before it, namely whether the district court holding barring the CUTPA claim, due to petitioner's asserted "employment" status, was erroneous, even though, on oral argument, the court asked respondent on what rationale it could construe petitioner to be an "employee."

IV. Respondent's Assertion Petitioner Was required to plead Fraudulent Concealment is Gravely Flawed

Respondent's assertion petitioner was required to plead fraudulent conceal-

ment is gravely flawed, for it expressly relies upon Connecticut procedure. It is elemental, under the Erie doctrine, that in federal courts federal procedure controls, and all state procedural practice is irrelevant, pp.16-18(Res. Brief).

Rule 7(a) of the Federal Rules of Civil Procedure (F.R.C.P.) makes no provision for filing a reply to affirmative defenses. The rule provides that..."There shall be a complaint and an answer,...and ..."no other pleadings shall be allowed," unless the Court orders otherwise.

Indeed, even under the applicable Connecticut practice petitioner has no duty to anticipate that respondent might raise an affirmative defense when drafting his complaint, as respondent seems to imply. The Beckenstein case respondent cites expressly relies on Rosenblatt v. Berman, 143 Conn. 31, 39-40, 119 A.2d 118,

which clarifies that, under Connecticut practice, a plaintiff's fraudulent concealment pleading is required only in a Reply pleaded after a defendant's plea of the statute of limitations.

Therefore respondent's assertions are erroneous on all possible grounds. Respondent appears to rely more on anticipated oversights by this Court than on the law, for it is difficult to suppose respondent is unaware of the foregoing.

What respondent is suggesting is that, in presenting his own case, petitioner is obliged to anticipate defenses respondent might raise and include speculative replies thereto in his complaint. Such a suggestion is absurd on its face, even if it was possible. Certainly the federal rules have no such bizarre requirement, but rather allow that a plaintiff may raise objections to affirmative defenses if they are actually

proposed at trial or an appropriate proceeding.

Had respondent any genuine desire, or belief in the need, for a reply to affirmative defenses, it could have moved the court therefor, consistent with F.R.C.P Rule 7(a), but it did not do so.

V. Respondent's Inference that Petitioner Claims the Issue of Jurisdiction Must be Submitted To the Jury is Untrue

Respondent's inference that Petitioner claims the issue of jurisdiction must be submitted to the jury is untrue, p.14, and it does not address his argument that certain factual issues should have gone to the jury before any ruling on jurisdictional issues. Also, respondent's conclusory averments in this section are merely self-serving, and the cases cited are not related to any specific matter which might be before the courts; such is of particu-

lar note, because nowhere in its brief does respondent contest the fact that it did not plead any affirmative defense on the ground that the parties' contract was terminated. Such pleading is required as a prerequisite to any finding that the contract might have been terminated, and the dismissal for lack of juridiction which asserted such as a component therefor is thus necessarily erroneous, for no pleading of such termination as an affirmative defense is in the record, and no properly instructed jury could have found against petitioner in the absence of such pleading.

Even had the contract been terminated petitioner was entitled to a jury determination on respondent's motives in terminating, Fortune v. National Cash Register Company, 364 N.E.2d, 1251, 1255-1257(1977), holding that contracts contain implied covenants of good faith and fair dealing, and

a termination not made in good faith constitutes a breach of contract, citing Restatment (Second) of Agency, Sec.454 and Comment (1958), Lemmon v. Cedar Point, Inc., 406 F.2d 94, 97, Coleman v. Graybar Elec. Co., Inc., 195 F.2d 374, Uproar Co. v. National Broadcasting Company, 81 F.2d 373, 377 (1st Cir.), cert. denied 298 U.S. 670. 56 S. CT. 835, 80 L.Ed. 1393, Restatement(Second) of Contracts, Sec. 231 (Tent. Drafts Nos. 1-7 (1973), 5 S.Williston, Contracts, Sec. 670 (3d ed. 1961). The foregoing is particularly applicable in this case, for the district court expressly recognized that petitioner had pled breaches of good faith and fair dealings as to the breaches of contract pled.

****

In summary, it thus can be fairly concluded that respondent has not addressed the actual issues presented on this petitioner

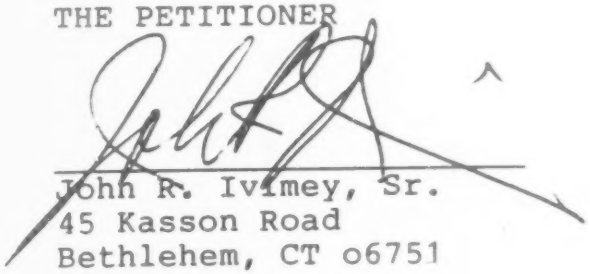
for Writ of Certiorari, but has instead sought to obscure the matters truly at issue in the manner set forth in its brief.

CONCLUSION

For the reasons stated herein, and in the petition, petitioner respectfully requests this Court to grant the within sought Writ of Certiorari.

Respectfully submitted,

THE PETITIONER



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